THE CONSTITUTIONALITY OF THE DELEGATIONS IN THE INTERSTATE COMMERCE LAW

BY

H. T. NEWCOMB

of the Bar of the District of Columbia

AUTHOR OF "RAILWAY ECONOMICS," "THE WORK OF THE INTERSTATE COMMERCE COMMISSION," "THE NEW INTERSTATE COMMERCE LAW," "THE DIMINISHED DOLLAR AND RAILWAY RATES," "TRUSTS; A STUDY IN INDUSTRIAL EVOLUTION," "THE FORCE AND EFFECT OF THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION," "THE SPOILS SYSTEM IN THEORY AND PRACTICE," ETC.

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CONSTITUTIONALITY OF THE DELEGATIONS IN THE INTERSTATE COMMERCE LAW*

THE learned judge who delivered the dissenting opinion in the recent case of Chicago, Rock Island and Pacific Railway v. Interstate Commerce Commission,[1] after quoting that portion of the Hepburn law [2] which confers rate-making power upon the Commission and calling attention to the fact that it had not been contended in that case that it amounted to an unconstitutional delegation of legislative power, continued as follows:

> "I assume, in the absence of specific assault, that the precedents have virtually placed that question beyond profitable debate." [3]

In thus summarily disposing of the suggestion that Congress may have exceeded its power by attempting to "substitute the judgment, wisdom, and patriotism" [4] of the Interstate Commerce Commission for "those

(1) Decided on August 24, 1909, 171 Fed. 680.
(2) Approved June 29, 1906, 34 Stat. 589.
(3) 171 Fed. 680, 690.
(4) "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsi-

* This paper was written, as must be obvious to the reader, before the passage of the Wickersham-La Follette amendment (Act of June 18, 1910), to the Hepburn Law. Section 8 of the new law, revising Section 4 of the old law, in terms gives to the Commission power to authorize exceptions to the general rule that intermediate charges must not exceed those for longer distances but without indicating in any way the conditions which must exist to warrant such exceptions. The constitutionality of this delegation is, at least, doubtful, and if it fails it must carry the whole section with it.

The authority to suspend changes in rates granted by Section 12 (revision of Section 15) of the new law seems to be either a grant of the whole legislative power over rates, for the period of the permitted suspension, or a grant of the judicial power to issue an injunction.

to which" the people of the United States by their Constitution, have confided "power to regulate commerce * * * * among the several states," [5] Judge Baker expressed a view which, perhaps without complete justification, has of late gained a considerable number of distinguished adherents. The constitutional question involved is one of scarcely measurable gravity and the evil consequences that might spring from a wrong conclusion are so extensive that, in spite of the warning given by the able jurist, it is proposed to re-examine the precedents which, without specific reference to any of them, he suggests have rendered further discussion unprofitable. Before doing so, however, it will be worth while to note that the Supreme Court does not regard the question as by any means foreclosed. That it is still open is the only possible conclusion from the language of the Court, speaking by Mr. Justice Brewer, in a case decided as recently as on March 23, 1908.

> "It is unnecessary to define the full scope and meaning of the prohibition found in Section 3 of the interstate commerce act, *or even to determine whether the language is sufficiently definite to make the duties cast on the Interstate Commerce Commission ministerial, and therefore such as may legally be imposed upon a ministerial body, or legislative, and therefore, under the Federal constitution, a matter for congressional action;* for within any fair construction of the terms 'undue or unreasonable,' the findings of the Circuit Court place the action of the railroads outside the reach of condemnation." [6]

To begin at the source of all Federal authority, the Constitution of the United States seemingly affords little basis for the suggestion that Congress can parcel out its powers, assigning and re-assigning them to whom it will and setting up various and sundry appointive deputy-Congresses to relieve itself of some of its more arduous burdens. "All legislative powers," reads the fundamental law:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." [7]

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bility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." Cooley's Constitutional Limitations, 7 Ed. 163.

(5) Constitution of the United States, Article 1, Section 8.

(6) Interstate Commerce Commission v. Chicago Great Western, 209 U. S. 108, 117, 118. The italics are the present writer's.

(7) Constitution of the United States, Article 1, Section 1.

* * * * * * *

"The Congress shall have power.

* * * * * * *

"To regulate commerce with foreign nations and among the several states, and with the Indian tribes." [8]

The notion that these clauses do not vest a power in so exclusive a manner as to preclude the transfer to a branch of the Executive Department of the authority apparently attempted to be conveyed by the Hepburn law depends, the writer ventures to suggest, (*first*) upon a false assumption that such a delegation must be on all fours with the delegation of similar powers by a State legislature with reference to commerce wholly within such state [9] and (*second*) upon a misconception of the nature of the powers themselves.

It is scarcely to be questioned that the people of the states of the Union have the power, not restrained by any clause of the Federal constitution, to authorize their legislatures to delegate any portion of the legislative power committed to them.

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(8) Constitution of the United States, Article 1, Section 8.

(9) There may still be a question whether a particular State constitution permits the delegation of legislative powers of this class. The State decisions upholding such delegations are seldom expressed in very general terms. The decision of the Illinois Supreme Court in Chicago, Burlington and Quincy Railroad v. Jones (Decided on April 2, 1894, 149 Ill. 361, 24 L. R. A. 141), invariably cited in support of the theory that this exception to the rule exists, is by no means as broad as the purpose which it is usually asked to serve. It does recite certain arguments in support of the exception but the Court expressly declined to rest its decision on those grounds, saying: "But, if it be conceded that making the schedule of the commission final and conclusive as to the rates is a delegation of legislative power, it is sufficient to say, in the present case, that the act of 1873 does not give to the schedule any such final and conclusive effect," and "That act does not establish reasonable maximum rates, nor does it delegate to the Board of Railroad and Warehouse Commissioners the power to establish such rates * * * * their schedule is given the force and effect of *prima facie* evidence as to the reasonableness of the rates in a suit involving the question of such reasonableness." The New York Court of Appeals in Saratoga Springs v. Saratoga Gas, Electric Light and Power Company (Decided on February 18, 1908, 191 N. Y. 123; 18 L. R. A. (N. S.) 713) held that there is such an exception in New York but its view seems to have been principally controlled by evidence that from a very early period the legislative bodies of that state have exercised the right to delegate similar powers. "Any statute, however, which attempts to authorize the Commission, in its judgment, to allow an increase of the capital stock of a corporation for such purpose and on such terms or conditions as it may deem advisable would be a delegation of legislative power and void."—State v. Great Northern Railway, 100. (1907) Minn. 445; 111 N. W. 289.

> "There might be a question whether, even if there were a clear delegation of legislative functions to other departments of the state government, it would be void under the Federal constitution. Whatever, in view of the distinct grant in the Federal constitution to the President, Congress, and the judiciary of separately the executive, legislative, and judicial powers of the nation, may be the power of Congress in the delegation of legislative functions, a very different question is presented when the restrictions of the Federal constitution are invoked to restrain like action in a state. Crimes against the nation must be prosecuted by indictment, yet a state may proceed by information. Suppose a state, by its constitution, grants legislative functions to the executive, or to the judiciary, what provision of the Federal constitution will nullify the action? Will the grant work an abandonment of a republican form of government, or be a denial of due process, or equal protection?" [10]

Certainly there is nothing in the Federal constitution which prohibits a delegation; authorized by a state constitution, of whatever legislative authority or discretion may be involved in the exercise of supervision, by a commission, of railroads and other common carriers wholly within the state.

> "There is nothing in the statutes or Constitution of the United States which prevents a state from creating a board of railroad commissioners and what powers the board shall have will depend upon the law creating them, of which the courts of the state are the absolute interpreters." [11]

There is, of course, no question whatever that state legislatures may delegate important duties involving the exercise of legislative discretion. The most familiar exception to the general rule which forbids the delegation of legislative power concerns the authority which may be conferred upon municipalities to establish local regulations and even to deal with local questions of revenue and taxation,[12] but the exceptions include numerous functions in the exercise of the police powers of the several states.[13]

If, as must probably be admitted, repugnance to the Federal constitution cannot be predicated upon a delegation of legislative power in a state statute, however clear or extensive such delegation may be, it follows that the

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(10) Michigan Central Railroad v. Powers, (1906) 201 U. S. 245, 249.

(11) Mobile, Jackson and Kansas City Railroad v. Mississippi, 210 U. S. 187, 202. No question as to rates was involved in this case but the principle is not affected.

(12) Cooley's Constitutional Limitations, 7 Ed. pp. 165, 166.

(13) Ernst Freund, The Police Power, pp. 34, 56, 57, 106, 174. 207, 212, 217, 496, 497, 643, 654, 649.

validity of the delegation must depend wholly upon the constitution of the state. And this is equivalent to saying that the state itself is the only authority competent finally to pass upon the question, and that the conclusion of its highest court on the question of constitutionality is binding upon the Federal courts.

> "It is sufficient to say in reference to this contention that the decision of the Supreme Court of the state of Pennsylvania sustaining the statute is conclusive in this court, as to any question of conflict between it and the state constitution." [14]

It is true that, in the exercise of concurrent jurisdiction when called upon to administer the laws of a state, a Federal court may be obliged, in advance of the question being presented to the state court, to decide whether a state statute is repugnant to the state constitution [15] but it accepts this duty with reluctance and never unless its performance is necessary.

> "It is an appropriate duty, which this court is called upon to perform very often, to protect rights founded on the Constitution, laws and treaties of the United States, when those rights are invaded by state authority. But it is a very different thing for this court to declare that an act of a state legislature, passed with the usual forms necessary to its validity, is void because that legislature has violated the constitution of the state.
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> "It has long been recognized in this court that the highest court of the state is the one to which such a question properly belongs; and though the courts of the United States, when exercising a concurrent jurisdiction, must decide it for themselves, if it has not previously been considered by the state court, it would be indelicate to make such a decision in advance of the state courts, unless the case imperatively demanded it." [16]
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> "If conflict with the state constitution is the sole ground of attack, the Supreme Court of the state is the final authority. * * * Undoubtedly a Federal court has the jurisdiction, and, when the question is properly presented, it may often become its duty, to pass upon an alleged conflict between a statute and the state constitution, even before the question has been considered by the state tribunals. All objec-

(14) Merchants' and Manufacturers' National Bank of Pittsburg v. Pennsylvania, (1897) 167 U. S. 461, 462, 463.

(15) "But the judiciary of the United States has no general jurisdiction to declare acts of the several states void, unless they are repugnant to the Constitution of the United States, notwithstanding they are repugnant to the state constitution. Such a power belongs to it only when it sits to administer the local law of a state, and acts exactly as a state tribunal is bound to act." Story on the Constitution, 5 Ed. p. 611.

(16) Pelton v. Commercial National Bank of Cleveland, (1880) 101 U. S. 143.

> tions to the validity of the act, whether springing out of the state or of the Federal constitution, may be presented in a single suit, and call for consideration and determination. At the same time the Federal courts will be reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state tribunals." [17]

Indeed, when full consideration is given to the principle of the supremacy of the state governments within their legitimate fields and in matters in which they are not restrained by the Federal constitution, and to the probability that should the state court subsequently uphold a state statute which, in advance of a state decision, had been pronounced incompatible with the state constitution by a Federal court, the Federal court would feel bound to abandon its earlier conclusion,[18] the duty appears to be so delicate, if not unprofitable, that, if the question were an open one, which it is not, it might be contended with great force that the determination of the legislature of a state as to constitutionality, with reference to the state constitution, implied by the enactment of a statute, should control the Federal courts until such time as they might be further instructed by the state judiciary.[19] There are very few cases in which the validity of a delegation by a state legislature of the legislative power to prescribe actual or maximum railway charges has been presented to a Federal court prior to its adjudication by the state court of last resort. Thus in the Railroad Commission cases (Stone v. Farmers' Loan and Trust Company), decided on January 4, 1886, the Supreme Court noted the fact that the highest court of Mississippi had held the delegation of authority, made by the legislature

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(17) Michigan Central Railroad v. Powers, (1906) 201 U. S. 245, 291.

(18) Greene v. The Lessee of Neal, 6 Pet. 291, 297, 301; Fairfield v. County of Gallatin, 100 U. S. 47, 54, 55. The decision of the Supreme Court of the state is controlling even though, when the question is presented in another case brought under the concurrent jurisdiction, "it is suggested that the decision * * * * should not be followed because the case in which it was announced did not involve a genuine controversy, but was prepared for the purpose of obtaining an adjudication."—Adams Express Company v. Ohio State Auditor, 165 U. S. 194, 219.

(19) Perhaps, any inconvenience to which such a rule of decision would subject litigants now having the right, by reason of citizenship, to ask the determination of such questions in the Federal courts would be no greater than actually arises from the very proper reluctance of these courts to condemn a state statute on purely state grounds. But the suggestion is wholly academic.

of that state and then questioned in the Federal court, not to be obnoxious to its State constitution. Undoubtedly then, the validity of the delegation of power under the State constitution was not in issue before the Supreme Court and its language may be regarded as tantamount to a declaration to that effect.

> "The Supreme Court of Mississippi has decided * * * that the statute is not repugnant to the constitution of the state, in that it creates a commission and charges it with the duty of supervising railroads. To this we agree and that is all that need be decided in this case." [20]

In this case the Supreme Court of the United States exercised no independent judgment but followed, as it was bound to follow, the conclusion of the state court. Reagan v. Farmers' Loan and Trust Company [21] follows the Railroad Commission cases, but presents an instance in which the Supreme Court acted upon a statute the validity of which, under the State constitution, had not been passed upon by the State court. Mr. Justice Brewer, speaking for the Court, said in part:

> "Passing from the question of jurisdiction to the act itself, there can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad or other carriers and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation.
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> "No valid objection, therefore, can be made on account of the general features of this act; those by which the state has created the railroad commission and entrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads." [22]

Whether the foregoing expresses in any degree the fact that the Supreme Court is:

> "Reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state tribunals," [23]

is an inquiry which perhaps, can be illuminated by consideration of the situation presented by the particular case then at bar. That case reached the Supreme Court

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(20) 116 U. S. 307; 29 L. ed. 636, 646. See also Atlantic Coast Line Railway v. North Carolina Corporation Commission, (1907) 206 U. S. 1.

(21) Decided May 26, 1894, 154 U. S. 362; 38 L. ed. 1014.

(22) 154 U. S. 362, 393, 394.

(23) Michigan Central Railroad v. Powers, (1906) 201 U. S. 245, 291.

on appeal from the Circuit Court of the United States for the Western District of Texas which had perpetually enjoined the Railroad Commission of that state from issuing any further railway tariffs or from seeking to enforce those already issued which were decreed to be unreasonable, unfair and unjust and consequently null and void. The Supreme Court agreed that the rates already established by the Commission were confiscatory and sustained so much of the decree of the Circuit Court as restrained their enforcement but reversed that portion which had enjoined the Commission from "proceeding to establish reasonable rates and regulations.[24] If the Supreme Court had held the delegation of power to the Commission to be in derogation of the State constitution it would seem that the whole decree must have been affirmed. But may it not, at least, be inferred that the court thought that, having protected the complainant in the Circuit Court against the only danger that was actually present, that is the enforcement of confiscatory rates that had been named by the Commission, and having intimated that any subsequent effort to prescribe an unreasonably low schedule of rates could be met in the same manner,[25] it was not "imperatively demanded," [26] that, in that case, it should task itself with the further burden of inquiring whether the State constitution authorized the State legislature to delegate the authority which the commission had undertaken to exercise. The relief given was adequate and effective. It fully met the real exigencies of the occasion and indicated the manner in which any others which might develop could be overcome. And it must not be forgotten that the National government is not permitted, "through any of its departments or officers," to "assume any supervision of the police regulations of the states."

> "All that the federal authority can do is to see that the states do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the Federal constitution." [27]

But even admitting, for the purposes of the argument,

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(24) 154 U. S. 362, 413.
(25) 156 U. S. 362, 395.
(26) Pelton v. Commercial National Bank of Cleveland, 101 U. S. 143.
(27) Cooley's Constitutional Limitations, 7 Ed. pp. 831, 832.

that the Supreme Court has held that state legislatures, not expressly restrained therefrom by their state constitutions, may delegate the power to establish railway rates, whether actual or maximum, to be applied to the traffic subject to state regulation,[28] it must be conceded that the question presented by an effort of the Congress of the United States to make a similar delegation of power over interstate commerce is vastly different. For it is elementary that the legislatures of the states may exercise the whole power of legislation, except as restrained by specific limitations in the state or Federal constitutions, while the Federal legislature may exercise no power not conferred either specifically or by necessary implication.

> "The government of the United States is one of *enumerated* powers; the governments of the states are possessed of all the general powers of legislation. When a law of Congress is assailed as void, we look in the National constitution to see if the grant of specified powers is broad enough to embrace it; but when a state law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the state we are able to discover that it is prohibited. We look in the Constitution of the United States for *grants* of legislative power, but in the constitution of the state to ascertain if any *limitations* have been imposed upon the complete power with which the legislative department of the state was vested in its creation." [29]

The general rule stated by Judge Cooley is apparently modified as to the territories, ceded territory and the District of Columbia, covering all of which Congress possesses the full legislative power except as restrained by specific limitations.

> "All territory within the jurisdiction of the United States not included in any state must necessarily be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the United States. They bear much the same relation to the general government that counties do to the states, and Congress may

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(28) The admission is argumentative only. "It is not necessary to pursue the matter further because of the recent decisions of the Supreme Court of the United States on rate commission statutes, which, while as properly urged by counsel for the appellant they do not pass upon the question of conflict between such statutes and the constitution of the states in which they were enacted, do necessarily determine that the enactment of such statutes does not violate the Federal constitution." Saratoga Springs v. Saratoga Gas, Electric Light and Power Company, (1908) 191 N. Y. 123, 333; 18 L. R. A. (N. S.) 713. See also note as to state decisions, *supra*, *p.* 7.

(29) Cooley's Constitutional Limitations, 7 Ed. p. 242.

> legislate for them as states do for their respective municipal organizations. The organic law of a territory takes the place of a constitution, as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme and, for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution." [30]

Hence the admitted power to delegate legislative authority in matters of local control in these cases affords no basis for the contention that the more general right of delegation is held where Congress is acting by virtue of its enumerated and, therefore, its more restricted powers.

There can be no comprehensive examination of the subject which does not lead to the conclusion that the inference is unwarranted which assumes that because acts of state legislatures assigning to commissions power, in their restricted fields, to fix railway rates have not been held by the Supreme Court to be invalid delegations of legislative power, equivalent authority over interstate commerce can constitutionally be delegated by Congress. It is possible, then, to proceed to an examination of the cases involving Congressional delegations of authority, unembarrassed by those decisions which relate to state statutes.

In doing so, it may be as well, at the beginning, to point out the erroneous conclusion often predicated upon a few well-known sentences, not strictly essential to the conclusion reached, contained in the opinion of the Supreme Court in Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway. Mr. Justice Brewer, speaking for the majority of the Court said:

> "Congress might itself prescribe the rates; *or it might commit to some subordinate tribunal this duty;* or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable." [31]

The words that have been italicized in the foregoing quotation, although plainly *obiter,* have frequently been cited as approving a Congressional delegation such as that

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(30) First National Bank of Brunswick, Maine, v. County of Yankton, (1880) 101 U. S. 129; 25 L. ed. 1046, 1047. As to ceded territory; De Lima v. Bidwell, 182 U. S. 1. As to District of Columbia; Stoutenburgh v. Hinnick, 129 U. S. 141.

(31) 167 U. S. 479, 494. The italics are the present writer's.

which is assumed to have been attempted in the Hepburn law. But that such an inference is incorrect is clearly demonstrated by a later extract from the same opinion:

> "And the argument is now made, and made with force, that while the Commission may not have *the legislative power* of establishing rates, it has *the judicial power* of determining that a rate already established is unreasonable, and with it the power *of determining what should be a reasonable rate* and [to] enforce its judgment in this respect by proceedings in mandamus. *The vice of this argument is that it is building up indirectly and by implication a power that is not in terms granted.*" [32]

These extracts make it clear that when the Court referred to a power to fix rates that might have been left to a subordinate tribunal it meant the quasi-judicial power of determining what rates are reasonable and just for the purpose of aiding the Federal courts and to be used as evidence in subsequent judicial proceedings.[33]

The decisions of the Supreme Court make it perfectly clear that Congress cannot delegate any part of the legislative discretion reposed in it by virtue of its enumerated powers or those incidental thereto. Of course, it can and must, of necessity, in many cases, leave to a ministerial officer some discretion as to the manner in which a ministerial act shall be performed, although it may control or restrict such discretion so far as its wisdom or convenience suggests; and it may empower the Executive Department to ascertain some fact upon which the legislative will, completely expressed by Congress, shall take effect. These are not essentially legislative powers although they are powers which legislatures may usually exercise.

> "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.
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> "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.
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> "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may

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(32) 167 U. S. 479, 509. The italics are the present writer's.

(33) In this connection the extract from Interstate Commerce Commission v. Chicago Great Western (209 U. S. 108, 117, 118) already quoted (*supra p.* 6) is very significant.

> commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." [34]

The opinion of the Supreme Court from which the foregoing extracts are taken was written by Mr. Chief Justice Marshall and the delegation then sustained was to the Federal courts to control the process of execution. Although the opinion described the particular power to which objection had been made as but "the regulation of the conduct of the officer of the court in giving effect to its judgments," and one "a general superintendence" over which is "properly within the judicial province" and "always so considered" it was plainly intimated that there was difficulty in going far enough to sustain the delegation.

> "It is, undoubtedly, proper for the legislature to prescribe the manner in which these ministerial offices shall be performed, and this duty will never be devolved on any other department without urgent reasons. But, in the mode of obeying the mandate of a writ issuing from a court, so much of that which may be done by the judiciary, under the authority of the legislature, seems to be blended with that for which the legislature must expressly and directly provide, that there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its courts." [35]

Prior to the decision just quoted it had been held in the case of The Aurora v. United States [36] that Congress could make the revival of a law, which had ceased to be in force, depend upon the ascertainment, by the President of the fact "that France had so revoked or modified her edicts, as that they ceased to violate the neutral commerce of the United States," and his proclamation of that fact, the Court saying:

> "We can see no sufficient reason why the legislature should not exercise its discretion in reviving the act of March 1, 1809, either expressly or conditionally, as their judgment should direct."

But the act left no discretionary alternative to the President, saying, merely "the President of the United States shall declare by proclamation."

It does not appear to have been actually necessary for the Supreme Court to have determined the question of

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(34) Wayman v. Southard, (1825) 10 Wheat. 1, 41-46.
(35) 10 Wheat, 1, 45, 46.
(36) 7 Cranch 382; 3 L. ed. 378, (1813).

delegation which was discussed in Field v. Clark [37] for the objection on this ground pertained only to Section 3, of the tariff act of October 1, 1890, and was only introduced under the contention that this section

> "being an essential part of the system established by Congress, the entire act must be declared null and void"

if the delegation was unauthorized by the Constitution. In the conclusion that the balance of the act would stand even though Section 3 should fail, Mr. Chief Justice Fuller and Mr. Justice Lamar (who wrote the dissenting opinion), although they held that the section in question amounted to an unauthorized delegation to the Executive "of those discretionary powers which the Constitution has vested in the law-making department" agreed with the six justices (there was one vacancy in the Court) who took the other view. The majority opinion in this case does not, however, materially extend the principle established in the case of The Aurora.[38] Starting with the explicit declaration:

> "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution,"

it holds that:

> "The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation."

The section claimed to constitute an improper delegation directed the suspension of provisions permitting the free importation of certain articles, from any country producing them, whenever "the President shall be satisfied" that such country imposed duties on American products which, in view of such free importation, "he may deem to be reciprocally unequal and unreasonable" and made it his duty to proclaim such fact and suspension. Thereupon, certain rates of duty, prescribed in the Act, were to take effect on such products imported from such country. Speaking for the majority of the Court, Mr. Justice Harlan said:

> "Congress itself prescribed, in advance, the duties to be levied, collected, and paid, on sugar, molasses, coffee, tea or hides, produced by or exported from such country, while

(37) Decided on February 29, 1892, 143 U. S. 649; 36 L. ed. 294.

(38) Supra, p. 16.

the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President.

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"As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingeucy. What the Presideut was required to do was simply in execution of the law of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." [39]

The act of Congress of March 2, 1897, which prohibited the "importation of impure and unwholesome tea" and authorized the Secretary of the Treasury to invoke the aid of a board of seven tea experts, upon whose recommendation he was to "fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported," whereupon "all teas, or merchandise described as tea, of inferior purity, quality and fitness for consumption to such standards" were to be denied admittance, was held, in Buttfield v. Stranahan, Collector,[40] not to delegate legislative power. The Court said, in part:

"We are of opinion that the statute, when properly con-

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(39) It is not impossible that it may be suggested that the terms "shall be satisfied," and "he may deem," in Section 3 of the act of October 1, 1890, are equivalent to the term "shall be of the opinion," in Section 15 of the Hepburn law, which describes the state of mind in which the Interstate Commerce Commission must find itself as to the unreasonableness of existing railway rates or regulations or practices before it can take up the work of substituting rates fixed by itself. But the court defined the President's function as that of ascertaining a fact, which is vastly different from forming an opinion. Again, if the fact to be ascertained had been whether a Federal law had been violated it could scarcely have been held that its ascertainment could have been left to the Executive. An unreasonable railway rate is an unlawful rate and whether a law has been violated is necessarily a question for the judicial department. Inquiry on this question was properly made by the Commission when it acted as a "general referee" (Kentucky and Indiana Bridge Company v. Louisville and Nashville Railroad, 37 Fed. 567) of the Federal circuit courts and made orders and findings in aid of subsequent proceedings in such courts but it is an entirely different thing to make such an inquiry, with conclusive effect, as a branch either of the executive or the legislative department.

(40) Decided on February 23, 1904, 192 U. S. 470; 48 L. ed. 525.

strued, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute.

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"Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

The second paragraph of the foregoing introduces, for the first time in any opinion of the Supreme Court, the suggestion of the incapacity of Congress to accomplish the legislative purpose without conferring power upon experts in the Executive Department but it by no means goes so far as to intimate that power involving the exercise of legislative discretion can be conferred. In fact, the opinion plainly negatives the suggestion and distinctly holds that the "primary standard" was fixed by Congress, leaving only a ministerial duty to the Secretary of the Treasury.[41]

It will be necessary, hereinafter, to enquire whether the requirements that railway rates shall be reasonable and not unjustly discriminatory establish a "primary standard" sufficiently definite to leave only ministerial duties to be performed by the agency which fixes the maximum rates to be permitted.

In Union Bridge Company v. United States[42] a majority of the Supreme Court held that to authorize the

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(41) Legislatures have very frequently sought expert assistance in the formulation of measures to be subsequently submitted to the legislative judgment and instances are not rare in which measures so prepared have been enacted without change. This would seem to be a better practice, in most instances, than to invoke the expert assistance subsequent to enactment. Perhaps the former plan could have been as effectively followed in fixing the standards for teas as that which was adopted. When the English Parliament determined to establish maximum railway rates by statute the labor of formulating the schedules was left to the Board of Trade but that body submitted the results of its work to Parliament and the rates did not become effective until they were embodied in a subsequent act.

(42) Decided on February 25, 1907, 204 U. S. 364; 51 L. ed. 523.

Secretary of War to determine whether a bridge over a navigable stream constituted an unreasonable obstruction to navigation did not amount to a delegation of legislative power. In this decision there reappears the argument based upon the convenience to Congress of the assistance of executive officers and also the concept of a general rule set up by the legislature leaving details to the executive. Mr. Justice Moody, speaking for the majority, said, in part:

> "Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation, have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation; and direct legislation covering each case, separately, would be impracticable, in view of the vast and varied interests which require national legislation from time to time. By the statute in question Congress declared, in effect, that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly-expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

On May 18, 1908, a majority of the Supreme Court held, in an opinion delivered by Mr. Justice Moody,[43] that a statute which required that the drawbars of all cars used in interstate freight service should be of uniform height, which height was to be fixed by the American Railway Association and declared by the Interstate Commerce Commission, was within the rule established in Buttfield v. Stranahan [44] and that there was no "unconstitutional delegation of legislative power to the railway association and to the Interstate Commerce Commission."

The cases thus reviewed plainly negative the suggestion that there are exceptions, in addition to those presented by the District of Columbia, the territories and ceded or conquered territory, to the rule that Congress

(43) St. Louis, Iron Mountain and Southern Railway v. Taylor, 210 U. S. 281, 287; 52 L. ed. 1061, 1064.

(44) 192 U. S. 470; 48 L. ed. 525, *supra* p. 18.

cannot delegate power of an essentially legislative character. Assuming, then, that Congress has attempted to confer power upon the Interstate Commerce Commission which partakes of the legislative character (and that Congress itself possesses and might have exercised the power, which it has attempted to confer), the delegation cannot be sustained unless it appears that Congress has really established the "primary standard" and assigned to the Commission "the mere executive duty to effectuate the legislative policy declared in the statute." Congress must, at least, have "legislated on the subject as far as was reasonably practicable."[45] Though "the maker of the law may commit something to the discretion of the other departments" the cases leave no basis for the suggestion that that something may amount to a substitution of the judgment of executive officers for the judgment of Congress. It seems that to sustain a delegation the boundaries within which ministerial action may be exercised must be so narrowed, either by definition in the grant or by the circumstances of the case, that the considerations determining the choice by the minister can relate only to the efficiency of the course decided upon as a means of carrying out the legislative purpose; if those considerations in any way extend to questions of public policy, of controlling or promoting industrial enterprise, of fostering the interests of particular localities, of favoring particular methods of doing business, of curtailing or intensifying the effectiveness of competition, of modifying the economic or social organization, then, it is plain that the limits of a constitutional delegation have been exceeded. Certainly it cannot be said that Congress has set up the "primary standard" or legislated "as far as was reasonably practicable" if, for example, having enacted that something shall be "reasonable" and left everything further to the determination of the Executive Department, it appears that there are many possible standards of reasonableness which might be applied and that the selection of one standard rather than another would produce widely different and far-reaching social and economic consequences.

The clauses of the Hepburn law which, according to the administrative theory, give the force of law to the orders of the Interstate Commerce Commission are:

"All orders of the Commission, except orders for the pay-

(45) Buttfield v. Stranahan, *supra* p. 18.

ment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction." [46]

"It shall be the duty of every common carrier, its agents and employes, to observe and comply with such orders so long as the same shall remain in effect.

"Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of Section fifteen of this act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense." [47]

The first section of the interstate commerce law, as amended on June 29, 1906, by the Hepburn law, authorizes the Commission to order any carrier subject to the act to:

"Construct, maintain and operate upon reasonable terms a switch connection with any * * * * lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same."

The sixth section of the act, after directing that no change in rates shall be made except after thirty days' notice to the Commission and to the public and establishing certain requirements as to publishing, posting and filing rate schedules authorizes, by the following clauses, two classes of orders.

"*Provided*, That the Commission may in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions."

"The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may

(46) Section 15.

(47) Section 16. The section also provides for a civil suit in the name of the United States to enforce this penalty. Section twenty provides a different penalty, recoverable in the same manner, for violation of an order prescribing the form of accounts. Of course the penalty clauses might be unconstitutional without affecting the rest of the act. Reagan v. Farmers Loan and Trust Company, 154 U. S. 362, 395, 396. Probably the same is true of the other clauses quoted above.

change the form from time to time as shall be found expedient."

Whatever rate-making power the Commission may exercise is conveyed by the fifteenth section. These orders are to be issued "after hearing [48] on a complaint." The first class of orders authorized by this section comprises those to be issued when the Commission

> "shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act, for the transportation of property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act,"

and, after forming such opinion has proceeded

> "to determine * * * * what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed."

The order to be made under such circumstances is defined in the following language:

> "that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed."

Subsequent clauses in the same section authorize the Commission, under certain conditions to order the establishment of through routes and by order to fix maximum rates over such routes, to prescribe the division of such rates among the different carriers in the routes and to order that not more than a certain maximum shall be paid by a carrier to the owner of property transported for the use of any instrumentality employed in the transportation which is owned by the latter or for any service rendered by him in connection with such transportation.

Section 20 authorizes orders requiring annual, monthly and special reports from carriers, prescribing the contents of such reports and the manner in which they shall

(48) This is the phrase used as to joint rates and transportation services rendered by owners of the property carried. As to the other class of orders the hearing required is defined as a "full hearing." A similar but more elaborate qualification limits the authority to issue the orders described in Section 1.

be rendered, fixing the time within which they shall be filed and requiring, "as near as may be," a uniform system of accounting. This section also contains authority for orders of great importance relating to the form of accounts, as follows:

> "The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys * * * * and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, * * * *"

It will not be expedient to consider each of these grants of power separately and at length, although it is by no means impossible that one or more of them may be constitutional even though all the others should be found to be obnoxious to the fundamental law. The words "upon reasonable terms" in the grant quoted from Section 1 evidently make applicable to it any considerations that would affect the more general grants in Section 15. The power to amend the sixth section "in its discretion and for good cause shown" attempted to be delegated by the clause first quoted from that section, being controlled by no "primary standard" whatever seems plainly beyond the power of Congress and also, to be so inextricably connected with the provisions as to notice of changes in rates that its failure must carry with it all the limitations on the right to change rates contained in the section; a most unfortunate result. On the other hand, the second delegation in that section, of the right to prescribe the form of tariffs, would appear to convey only a ministerial duty and, of itself, to be well within the limits of the functions that may be delegated. The really significant delegations are those of the fifteenth and twentieth sections; the first as to rates, the second as to accounts.

The delegations in the fifteenth section are, of course controlled by the requirements and prohibitions of the first and third sections. These sections go no further than to require that "all charges * * * * shall be just and reasonable," to prohibit "every unjust and unreasonable charge" [49] and to prohibit giving "any undue or unreasonable preference or advantage" or creating "any undue or unreasonable prejudice or disadvantage" to the profit or injury of any person, locality or class of

(49) Section 1.

traffic.[50] These are the standards set up by the law. The question is whether as "primary standards" they are "sufficiently definite to make the duties cast on the Interstate Commerce Commission ministerial."[51] Has Congress, in this respect, "legislated on the subject as far as was reasonably practicable" and left to the Commission only "the mere executive duty to effectuate the legislative policy"?[52]

That there are numerous standards which might be made the tests of reason and justice has frequently been urged; that there is certainty in any standard that might be adopted has, as frequently, been denied. Even in the dissenting opinion of Judge Baker, already quoted,[53] the wide range of selection permitted to the Commission, if this delegation is valid, was plainly stated, as will be seen from the following:

> "One possible system of rate-making would be to adopt the postage method of uniform charge throughout the whole country, irrespective of distance. Another would be to divide the country into zones, and adopt a uniform charge from any place within one zone to any place within another zone, irrespective of distance. Another system would be to base the charge absolutely upon mileage. None of these has ever become established on American railroads though I believe the use of any of them, because not expressly denied, was open to the Commission."[54]

The foregoing by no means exhausts the list of divergent and possible standards. It leaves out of the account the cost of service standard, the value of the service to the shipper standard, the taxation standard, the fair return on a fair valuation standard, the what-the-traffic-will-bear standard, all standards that have been proposed with confidence and sincerity and urged with plausibility and vigor. Can it be possible that a choice of such tremendous importance to the economic welfare of every citizen, every industry and every locality can effectively be delegated under a government by the people, Repub-

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(50) Section 3.

(51) Interstate Commerce Commission v. Chicago Great Western, 209 U. S. 108, 117, 117; *supra*, p. 6.

(52) Buttfield v. Stranahan, 192 U. S. 470; *supra*, p. 18.

(53) *Supra*, p. 5.

(54) Dissenting Opinion, Chicago, Rock Island and Pacific Railway v. Interstate Commerce Commission, Circuit Court, N. D. Illinois E. D., 171 Fed. 680, 692. The significance of this extract from a dissenting opinion is not diminished by the fact that Judge Baker took extreme ground in support of the validity of the delegation.

lican in form and presumably intended to be so in substance, to an appointive board? Of orders based upon a selection among these different standards it would seem proper to speak in language similar to that used by the Supreme Court in the Import Rates case.[55]

> "* * * * such orders are instances of general legislation requiring an exercise of the law-making power and * * * * instead of being regulations calculated to promote commerce and enforce the express provisions of the act, are themselves laws of wide import, destroying some branches of commerce that have long existed, and undertaking to change the laws and customs of transportation in the promotion of what is supposed to be public policy."

In the same opinion the Supreme Court defined the words "reasonable," "unjust," "undue," and "unreasonable," as used in the second and third sections in terms clearly incompatible with the theory that they are sufficient to limit a discretion that is merely ministerial.

> "The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation, or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal[56] appointed to carry into effect and enforce the provisions of the act."[57]

But the Supreme Court has expressly declared that the rate-making power is legislative as distinguished from administrative; that is, not merely *partaking* of the legislative character or *quasi*-legislative, such as may be delegated, but actually and exclusively legislative. Is such an interpretation to attach undue significance to the following?

> "The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions at-

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(55) Texas and Pacific Railroad v. Interstate Commerce Commission, (1896) 162 U. S. 197, 234.

(56) It should be borne in mind that when this decision was rendered the "tribunal," that is to say, the Commission acted merely as "general referee" for the Federal circuit courts. No one then contended that its orders had statutory force.

(57) 162 U. S. 197, 219.

taching to such carriage, is a power of supreme delicacy and importance." [58]

Again in the same opinion the Court said:

"It is not to be supposed that Congress would ever authorize an administrative body to establish rates without inquiry and examination; to evolve, as it were, out of its own consciousness, the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country." [59]

When seeking to determine the essential nature of the power of rate-making, even the Supreme Court of the United States can scarcely be considered a higher authority than the exceedingly able body of men who constitute, and have constituted, the Interstate Commerce Commission. Selected in most cases from among those Americans distinguished in statecraft, in jurisprudence or in other activities, the Commissioners, with barely an exception, have striven with ability and devotion to qualify themselves as experts in transportation economics, for the difficult and arduous duties entrusted to them. What have they said, in formal annual reports to Congress, in opinions in decided cases, and as individuals in well-considered expressions of their views, concerning the nature of the discretion which must be exercised in determining the matters to be prescribed in orders issued under Section 15? Through all the mass of illuminating discussion suggested by these references runs the plain declaration that the questions are broad questions of public policy, that the discretion to be exercised is that of choosing among different policies that which is deemed most conducive to general welfare; a choice, it is submitted, which only the legislature is constitutionally competent to make. This idea is very clearly expressed in the First Annual (1887) Report of the Commission, in language which may definitely be attributed to Hon. Thomas M. Cooley, the great jurist whose distinguished service as chairman of that body is by no means least among his many notable services to the public.

"The question of the reasonableness of rates involves so many considerations and is affected by so many circumstances and conditions which may at first blush seem foreign, that it is quite impossible to deal with it on purely mathematical principles, or on any principles whatever, without a

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(58) Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway, (1897) 167 U. S. 479, 505.

(59) 167 U. S. 479, 509.

consciousness that no conclusion which may be reached can by demonstration be shown to be absolutely correct.

"* * * * to take each class of freight by itself and measure the reasonableness of charges by reference to the cost of transporting that particular class, though it might seem abstractly just, would neither be practicable for the carriers nor consistent with the public interest.

"The public interest is best served when the rates are so apportioned as to encourage the largest practicable exchange of products between different sections of our country and with foreign countries; and this can only be done by making value an important consideration; and by placing upon the higher classes of freight some share of the burden that on a relatively equal apportionment, if service alone were considered, would fall upon those of less value." [60]

In another place in the same report Judge Cooley wrote that the method of apportioning railway charges among different services which would be best for the country must be based on a principle similar to that to which rates of taxation ought to be adjusted.

"* * * * to apportion the whole cost of service among all the articles transported, upon a basis that should consider the relative value of the service more than the relative cost of carriage. * * * * Such a system of rate-making would in principle approximate taxation; the value of the article carried being the most important element in determining what shall be paid on it." [61]

No one has ever suggested that Congress could delegate to any other agency the fixing of a lawful rate of taxation yet the idea that the principles of rate-making and the consequences of following one theory or another approximate those of taxation is prominent in the reports of the Commission. The following appeared in 1895:

"The guardianship [62] of the public interest so far as interstate commerce is concerned is, under the existing law, entrusted to this Commission. The nature of that interest consists primarily in just and equitable rates for transportation

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(60) First Annual (1887) Report of the Interstate Commerce Commission, p. 36.

(61) First Annual (1887) Report of the Interstate Commerce Commission, p. 31.

(62) This paternalistic theory of the Commission's functions is very apparent in the reports issued during the ten or twelve years immediately prior to the passage of the Hepburn law. One is compelled to suspect that the words "public interest" are used in a rather narrow sense for in another annual report (1897) the Commission said: "The purpose of the act was to provide a means by which the public could array itself against the carrier, * * * *"—Eleventh Annual Report of the Interstate Commerce Commission, p. 19.

> and in equal service for equal payment to all patrons of the railways; time, place, and other conditions being taken into consideration. No one who understands the intricacies of transportation would care to assert that the determination of a just rate, or the decision as to what constitutes discrimination, is an easy task. To some extent the principles upon which taxation rests must be allowed in fixing a just rate; to some extent the result of the rate upon the development of industries must be taken into account in all decisions which the Commission is called upon to make; to some extent every question of transportation involves moral and social considerations, so that a just rate cannot be determined independently of the theory of social progress." [63]

Whose theory of social progress? What principles of taxation? To what extent is "some extent" in each case and who shall declare the relative weight of each class of considerations? Are these primary standards fully defined? Has Congress here legislated as far as reasonably practicable and left only the execution of the fully expressed legislative will to this ministerial body? Or take this from the report rendered at the close of the year 1904. "The injury," meaning the damage inflicted by unjust discriminations "between rival localities or competing articles of traffic,"—

> "The injury * * * * can be redressed only by the exercise of sufficient authority to readjust rate schedules to be observed in the future on the basis of relative justice." [64]

Not less disconcerting to those who regard the words "just" and "reasonable" as setting up definite standards for the adequate guidance of ministerial officers, is the following:

> "To give each community the rightful benefits of location, to keep different commodities on an equal footing, so that each shall circulate freely and in natural volume, and to prescribe schedule rates which shall be reasonably just to both shipper and carrier, is a task of vast magnitude and importance. In the performance of that task lies the great and permanent work of regulation." [65]

If this is definite let some one appraise the "rightful" worth of the location of some one town or city; let some one tell what is an "equal footing" for wheat and dressed pork moving between Chicago and the Atlantic sea-

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(63) Ninth Annual (1895) Report of the Interstate Commerce Commission, p. 59. The Commission naively adds: "This argument is perhaps as 'indefinite as it is comprehensive.'"

(64) Eighteenth Annual (1904) Report of the Interstate Commerce Commission, p. 9.

(65) Seventh Annual (1893) Report of the Interstate Commerce Commission, p. 10.

board; let some one express in ton-miles the movement of pianos which would be equivalent to free circulation throughout the United States; let some one put in figures the "natural volume" in which boots and shoes ought to move from Massachusetts to Minnesota. Can the Commission answer these questions? Certainly not, witness the following:

> "It is often difficult to say what constitutes a reasonable rate, and more difficult to give in detail the reasons that lead to that conclusion. Although the Supreme Court of the United States has furnished certain rules by which to test the reasonableness of transportation charges, and although this Commission has endeavored to apply those rules, yet whenever it has interrogated railway officials as to whether or not they are governed by them when making rates of transportation, they have invariably answered in the negative and said that to do so would be impracticable. The carriers do not apparently possess the necessary data for that purpose and there is at present no other source from which the Commission can obtain such data." [66]

> "We have endeavored to find some fundamental principle by the application of which this dispute might be laid at rest, but entirely without success. It is said that a fair differential is one which would give to these several ports the traffic to which they are entitled. It is also said that these several ports are entitled to what part of this traffic they can obtain under a fair differential. New York urges that its facilities upon the ocean must not be interfered with, while Baltimore and Philadelphia assert with equal positiveness that they must not be deprived of their advantages upon the land. While there is no fundamental principle, however, which can be applied there are certain fundamental considerations which should be kept in mind." [67]

Bearing in mind the fact that the Commission recognized that the differentials which it established in the case from the decision in which the foregoing is quoted would control the distribution of the "enormous export traffic," of the North Atlantic seaports, not only among the carriers reaching those ports but also among the ports themselves, it must be worth while to note that the very next paragraphs define the standards for that case in terms as indefinite as any herein quoted.

> "If it can be properly done, *these ports should all be kept open* for the transaction of this export business upon such

(66) Report and Opinion of the Interstate Commerce Commission in Marten v. Louisville and Nashville Railroad, 9 I. C. C. Rep. 581, 597. Decided on November 21, 1903.

(67) Report and Opinion of the Interstate Commerce Commission in the Matter of Differential Freight Rates to and from North Atlantic Ports (April 27, 1905,) 11 I. C. C. Rep. 13, 62.

terms that each one may *fairly compete* for it. No *marked advantage* should be given, certainly not by the creation of *artificial conditions*, to any one port over the other. The ideal condition would be the establishment of such rates that enterprise at either port in the way of improvement in service or facilities might be *rewarded by increased business* and that there might exist that *healthy struggle* of locality against locality which is the best security for proper commercial development. This is justly demanded by the interests of the communities involved.

"In disposing of this question the interests of the carriers which serve these communities should be none the less kept in view. If, again, it can be properly done, these rates should be so adjusted that this competitive traffic will be *fairly distributed* between the different lines of railways which serve these ports." [68]

Other quotations, selected almost at random from the vast mass of material to the same effect, showing the prevailing idea that broad and great questions of public policy are involved and that they must be settled without the application of any clear and definite standards, are inserted without additional comment.

"The mandate of the statute is that all rates must be reasonable and just, but how the reasonableness and justice of a rate are to be determined is not prescribed by the statute, nor has any satisfactory test been evolved by transportation experts. * * * * A rate that might be regarded as reasonable and just by a producer and shipper, might, from a carrier's standpoint, be deemed extremely unreasonable and unjust, and so, conversely, a rate that a carrier might claim to be reasonable in itself, and that it might support with strong reasons based upon the cost of service, the quantity of the business and the characteristics of its line of road, might exhaust the greater part of the proceeds of the producer's commodity, and be destructive to his interests. It is only stating a truism, therefore, to say there is no recognized test of a rate mutually reasonable for a carrier and for a producer of the traffic." [69]

"*Within certain limits*, therefore, it is good policy for the railway manager to increase his tonnage, even at the expense of reducing the rate per ton. *Just how far this rule applies no one can tell.* The merchant who buys an article for a definite price knows when he sells it whether he makes or loses by the transaction; and the manufacturer, as a rule, has a pretty accurate idea of the cost of production, but the railroad operator can not ordinarily say whether he should or

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(68) 9 I. C. C. Rep. 13, 62. The italics are the present writer's and are intended to call attention to words which express conditions that one would like to have further defined.

(69) Report and Opinion of the Interstate Commerce Commission in Delaware State Grange v. New York, Philadelphia and Norfolk Railway, (1891) 3 Int. Com. Rep. 554.

should not as a matter of good policy take traffic at a certain price." [70]

"The freight rate is a complex problem when applied to almost all competitive traffic. Very few people not acquainted with the subject have any idea how difficult the solution of that problem is. Rates between points which, to a superficial observer, have no connection are in fact interdependent. The rate from New York to New Orleans by water may control the rate from Chicago to St. Louis by rail. *In fixing particular rates the claims of different transportation lines, different markets, and different commodities all have to be considered and offset one against another.*" [71]

"We think a broad view of what constitutes profitable policy for a carrier includes the increase of trade at all stations and the building up of the various localities along its line, and while a carrier may find some temporary or comparative profit in concentrating traffic in large cities, the interests of the public, generally speaking, lie in an opposite direction; * * * *" [72]

"It is plain that until there be fixed, either by legislative enactment or by judicial interpretation, some definite basis for the valuation of railroad property, and some limit up to which that property shall be allowed to earn upon that valuation that there can be no exact determination of these questions. In the absence of such a standard, the tribunal, whether court or commission, which is called upon to consider the matter, can only upon the whole exercise its best judgment." [72*]

"Now, the fixing of a railway rate is in its nature legislative rather than judicial. There is no standard by which it can be determined. It might be thought that the price charged for a transportation service ought to be governed by the cost of rendering that service; but it is agreed on all hands that, assuming the possibility of ascertaining the cost, still our interstate rates could not be made on that basis. A comparison with other rates is of but little value, since conditions are seldom the same in two cases. The element of competition plays an important part, and one of the most difficult questions to decide is how far a carrier may properly discriminate in view of competitive conditions. Assuming that the amount of money which a railroad ought to earn is fixed, from what source shall it derive that amount? How much shall come from the passenger business? How much from freight? What rate shall be applied to a particular species of freight as compared with other commodities? In determining the justice or reasonableness of a particular rate all these factors, and many others, may present themselves

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(70) Twelfth Annual (1898) Report of the Interstate Commerce Commission, p. 17. The italics are the present writer's.

(71) Twelfth Annual (1898) Report of the Interstate Commerce Commission, p. 15. The italics are the present writer's.

(72) Marten v. Louisville and Nashville Railroad, (1903) 9 I. C. C. Rep. 581, 599.

(72*) Report and Opinion of the Interstate Commerce Commission, Re Advance in Freight Rates, (1902) 9 I. C. C. Rep. 391.

for consideration. They are proportionately taken into account by the traffic official who fixes the rate in the first instance, and they must be considered by the administrative body which revises that rate. It is finally a question of judgment, what, taking everything into account, ought fairly to be done." [73]

"It is not essential to this line of thought to express full agreement with the extreme advocates of valuation whose arguments seem to imply that, if the value of the property is known, a reasonable rate can be determined by mathematical calculation. Many other considerations are involved in the problem, notably the manner in which the rate proposed will affect the industrial development of the country." [74]

"As I said, I am very far from believing that there should be anything more than the most inconsiderable tendency, if any at all, toward the adjustment of rates on a mileage basis, and I think the prosperity of the railroads, the development of the different sections of the country and their industries justify, the making of rates upon what might be called a commercial basis; but do you realize what an enormous power that is putting into the hands of the railroads? That is the power of tearing down and building up. That is the power which might very largely control the distribution of industries. And I want to say in that connection that I think on the whole it is remarkable that that power has been so slightly abused.

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"Suppose it were true that a more potent exercise of government authority in the adjustment of rates tended somewhat to increase the recognition of distance, with the result of producing a greater diffusion of industry rather than its concentration. * * * * I cannot believe that all those institutions, laws, administrations, which operate to the concentration of industries and population are to be commended. They may result in greater aggregate wealth for the country. I am prepared to admit that they do; but do they result in happier homes, better lives, greater social comfort? I have some doubt of it." [75]

"There is no absolute standard of a reasonable freight rate, and there is, therefore, no absolute right upon the part of a railroad to charge a particular rate." [76]

"The principles which lie at the basis of just railway schedules arise from a study of the theory of taxation. As

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(73) Hon. Charles A. Prouty, member of the Interstate Commerce Commission, in the *American Monthly Review of Reviews*, May, 1906.

(74) Twenty-second (1908) Annual Report of the Interstate Commerce Commission, pp. 83-4.

(75) Honorable Martin A. Knapp, Chairman of the Commission, Testimony taken by the Senate Committee on Interstate Commerce, May, 1905, Vol. IV, pp. 3298, 3299. Here is an important and interesting "theory of social progress," on which rates might be based. But is it the theory which Congress would adopt?

(76) Twenty-third Annual (1909) Report of the Interstate Commerce Commission, p. 7.

in taxation payment for the support of government should be in proportion to the ability of citizens, so the contributions of shippers to the fund necessary to meet the legitimate demands of railways should be made from various classes of goods in proportion to their ability to bear the charges.

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"A just rate does not mean a rate which a particular shipper can pay for particular goods, but rather a rate which, when enforced and maintained, entails in a community just and commendable results. The question involved in this controversy is not simply commercial in character, it is at the same time a question of public policy, and as such, like all questions of a political character, demands the fullest and completest knowledge respecting it." [77]

The principles of rate-making are not only too indefinite to permit the delegation of that duty, at least without very definite expression of the legislative will as to the rules which shall guide the acts of the grantee of power, but the consequences attending the exercise of the legislative authority over rates are so vast that it is not safe to permit an infraction of the constitutional rule which has wisely united legislative power and legislative responsibility to the end that a dissatisfied constituency may quickly substitute a satisfactory legislative agent. Said the Commission, in 1904:

"It is probably near the truth to say that the cases now pending before the Commission directly or indirectly affect almost every locality, and therefore nearly all of the people of the United States." [78]

In its report for 1897 the Commission quoted from the decision of the Supreme Court in Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway [79] as follows:

"The importance of the question can not be overestimated. Billions of dollars are invested in railroad properties. Millions of passengers, as well as millions of tons of freight, are moved each year by the railroad companies, and this transportation is carried on by a multitude of corporations working in different parts of the country and subjected to varying and diverse conditions."

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(77) Professor Henry C. Adams, Statistician to the Interstate Commerce Commission. "Service of a Bureau of Railway Statistics and Accounts," a paper read before the National Convention of Railroad Commissioners, April 19-20, 1893, and published in its proceedings, see pages 51 and 52. While Professor Adams is an employee and not a member of the Commission he is an economist of distinction and, on this occasion, no doubt expressed the views of the Commission as well as his own.

(78) Eighteenth Annual (1904) Report of the Interstate Commerce Commission, p. 29.

(79) 167 U. S. 479, 494.

Commenting upon the foregoing the Commission remarked that "from the railroad standpoint" the Supreme Court had stated "forcibly and justly the importance of the question" and continued:

> "We may suggest that it is of even greater importance from the public standpoint. * * * * A very slight change in rates upon any of the staple commodities amounts to an enormous sum in the aggregate. In most articles of daily use the transportation charge is a large and often the larger part of the cost to the consumer. The freight rate may determine whether the Kansas farmer shall burn his corn for fuel or send it to market. The traffic manager may decree whether an industry shall exist or a locality flourish. It is not only the billions of dollars invested in railway properties which this question touches, but the prosperity and welfare of the people at large throughout the whole nation." [80]

Two years earlier the Commission had said:

> "Where the cost of an article is so much affected by the expense incurred in bringing it from the place of production, the relative rates applied to competing towns determine to a great extent the volume of their business and the measure of their growth.
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> "The power of the railroads in this direction is enormous. They can build up or destroy a commercial center almost at will. They can raise or reduce the prices of agricultural products, and so enhance or depress the value of wide areas of land. They can decree that one town shall be enriched by the impoverishment of its rival; that one community shall languish while another flourishes.
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> "Generally speaking, there is more or less competition in the consuming markets between raw materials and their manufactured products. If either of these rivals is unduly aided through the charges fixed by the public carrier individuals and communities may receive incalculable injury. Upon the fair adjustment of rates between such commodities, for example, as wheat and flour, live animals and dressed meats, pig iron and hardware, and scores of others, the most important interests are in constant dependence. A slight increase, for instance, in the rates on flour with a slight decrease in the rates on wheat might transfer to eastern points the great milling industries of the Northwest and reduce the business in a city like Minneapolis to the limited demands of its local trade. So an apparently inconsiderable variation in the relative charges on dressed meats and live animals might shift the location of every large slaughterhouse from one part of the country to another, with resulting confusion and loss beyond the reach of redress." [81]

The foregoing appeared as a part of a plea for entrusting to the Commission the enormous power which was al-

(80) Eleventh Annual (1897) Report, p. 15.

(81) Ninth Annual (1895) Report of the Interstate Commerce Commission, pp. 15, 16, 17.

leged to be in the hands of the rate-making officers of the railways. But even in making this plea the Commission found it expedient to admit that "these illustrations may be extreme," when applied to the limited control of rates exercised by railway officers, that commercial conditions constitute a strong check upon wrongful exercise of such powers, and that instances of improper exercise were infrequent. The report quoted said, in the same connection:

> "Of course there are various conditions—commercial and otherwise—which act in most cases as checks upon arbitrary conduct; and even where such safeguards do not appear to exist it stands to the credit of railway managers that they are rarely chargeable with wanton extortion.
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> "In view of the opportunities, and the temptations to which their traffic officers are exposed, it is perhaps not too much to say that the obligations of neutrality in this regard are usually observed, and that discriminations of this character are not often the subject of complaint." [82]

These checks operate, then, effectively and with a measurable degree of satisfaction to railway patrons, upon railway officers when the latter make rates, subject to the rules of the law and to free negotiation with the purchasers of transportation. If, on the other hand, the power to make these rates, involving this tremendous power over commerce and Society, is placed in the hands of an appointive governmental board, what checks remain? Certainly such a board is subject to no commercial check and even the political check is minimized where there is no direct responsibility to any constituency. That mistakes of far-reaching consequences are not impossible is suggested by the following expression of the Supreme Court:

> "The effort of the Commission, by a rigid general order, to deprive the inland consumers of the advantage of through rates, and to thus give an advantage to the traders and manufacturers of the large seaboard cities, seems to create the very mischief which it was one of the objects of the act to remedy." [83]

Commissioner Prouty, speaking for the Commission, in a report and opinion rendered on April 1, 1903,[84] propounded and answered, among others, three inquiries

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(82) Ninth Annual (1895) Report, pp. 16, 17.

(83) Texas and Pacific Railway v. Interstate Commerce Commission, (1896) 162 U. S. 197, 221, 222.

(84) In the Matter of Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382.

which, it may be suggested, involve quite unmistakably, broad questions of public policy requiring, if not settled by the fundamental law of the Constitution, legislative discretion for their determination. These questions were:

> "The government of the United States could probably borrow what money would be needed to buy or build the railways of this country at from 2 1-2 to 3 per cent. Ought the public to be taxed for the service rendered beyond this rate of interest?" [85]
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> "Moreover, the value of a railway system does not depend upon the mere cost of its embankment or its equipment. It is rather a question of location, of connections, of terminal facilities, of enterprises along its line; and shall nothing be allowed to the foresight and ability which have marked out and perfected that system?" [86]
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> "Ought not a railway to be allowed to accumulate in some form, a surplus during fat years which may tide over subsequent lean years?" [87]

These questions are typical of those which must arise when the rate-making body is not more definitely instructed than by the declaration, which by no means adds to the law as it has always stood, that rates shall be reasonable and just. A single and narrow phase of the power to determine such fundamental questions and to issue a fiat, containing the determination was described by Judge Grosscup in a recent opinion of the Circuit Court for the Northern District of Illinois as involving:

> "power, by the use of differentials, to artificially divide up the country into trade zones tributary to given trade and

(85) Answered in the affirmative, 9 I. C. C. Rep. 382, 402.

(86) Answered, that something may be allowed, 9 I. C. C. Rep. 382, 402, 403, 404.

(87) The opinion continues: "To this we would unhesitatingly answer in the affirmative. In times like the present a railroad company should be allowed to earn something more than a merely fair return upon the investment." This seems to be equivalent to saying that an *unfair* return should be allowed in "fat years." Probably Commissioner Prouty meant to say that the rate of return which is "fair" in prosperous years is not limited to what may have been earned in years of depression. It is hardly possible that he meant that the Commission or Congress could impose upon the carriers, in "lean years" a schedule of rates that would produce a smaller rate of return on the investment than the same carriers must be permitted to earn in "fat years." Or did he mean that the earnings and value for a long series of years, including periods of prosperity and adversity alike, should be compared and that the average rate of return for the whole period ought to be a fair one? Evidently the settlement of this question, in any aspect, is one calling for an exercise of exclusively law-making power, perhaps, of a character not granted to Congress by the Constitution.

> manufacturing centers, the Commission, in such cases having, as a result, power to predetermine what the trade and manufacturing centers shall be; * * * * a power vaster than that any one body of men has heretofore exercised, * * * putting in the hands of the Commission the general power of life and death over every trade and manufacturing center in the United States." [88]

In the exercise of this indefinite and extraordinary authority the Commission has found that even the very general standards which it assumes to have set up cannot always be applied. The following from the Annual Report for 1907 illustrates this:

> "While these rates seemed high to the Commission and much in excess of the average passenger rates, the conditions and situation of this road are very peculiar for a road of its length. It is practically without branches, unfinished, and without southern connections which are necessary alike to enable it largely to increase its business and to satisfactorily serve the public. Having recently defaulted in the payment of its interest charges and in consequence been reorganized, it is still a question as to whether it will be able to meet its obligations in the future. It is to be hoped that if it does it may soon reach a point when these rates can and will be reduced with reasonable certainty that its solvency will not thereby be impaired. While the Commission was not sure that a reduction of rates might not result in equal or greater revenues from passenger traffic, it hesitated for the present, under all the circumstances, to make an order in this case which might have a contrary effect, and the complaint was therefore dismissed." [89]

Although the Commission proceeds in rate cases only upon complaint and there must be a "full hearing" [90] neither party ever knows precisely what constitutes the record upon which the decision of the Commission will be based. Lawyers who are not familiar with the practice will be interested to learn that:

> "the determination of almost every case requires consideration of conditions, tariffs, and statistics which are not presented to the Commission,"

and that:

> "the information necessary to intelligent action by the Commission can frequently be obtained from a verbal interview with the head of the appropriate division,"

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(88) Chicago, Rock Island and Pacific Railway v. Interstate Commerce Commission, (1909) 171 Fed. 680, 683, 684.

(89) Twenty-first Annual (1907) Report, p. 46. Reference is to Railroad Commission of Arkansas v. St. Louis and Northern Arkansas Railroad, 12 I. C. C. Rep. 233.

(90) Section 15. A complaint will not be necessary after the act of June 18, 1910, takes effect.

of the Commission's office.[91] Those who apprehend the full significance of these extracts will be prepared to estimate the public importance of the fact that, without exception, the appointees to membership in the Commission have, from the beginning, been men of exceptional intelligence and capacity, of remarkable industry, of profound discretion, of the highest integrity, of the coldest impartiality, and of the most sincere patriotism. Without all these qualities they could scarcely have sustained the responsibilities of so great a trust.

But even these qualities do not make the "judgment,

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(91) Twenty-second (1908) Annual Report of the Interstate Commerce Commission, pp. 9-10.—The full statement on this subject is as follows: "Practically every complaint, formal or informal, which comes before the Commission requires examination of tariff files and statistical reports of the carriers for the purpose of determining whether or not the complaints are well founded and accurately stated. With the present unification of these several branches of the work such reports are obtained in very short time. In fact, the information necessary to intelligent action by the Commission can frequently be obtained from a verbal interview with the head of the appropriate division, and in a great many instances no further research is necessary. In this connection it should be remembered that for the heads of its tariff and statistical divisions the Commission has chosen practical railroad men.

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"Moreover, it must be remembered that the commission can seldom, if ever, decide a case merely upon the evidence presented to it. In this respect it is radically different from a court. The ordinary court determines only the rights of the parties before it, but every decision of the Commission involves the rights of parties who are not present. Any important readjustment of rates applies not only to the complainant but also to all shippers under those rates, and frequently, as a commercial necessity, to carriers who are not before the Commission in a particular case; and in addition to the evidence actually presented to the Commission, it must consider the effect of a ruling in any given case upon carriers, shippers, or localities who are not represented. It is obvious, therefore, that the determination of almost every case requires consideration of conditions, tariffs, and statistics which are not presented to the Commission, but which it must take notice of in order to faithfully perform its duty, and the proper expedition of the Commission's work requires that these aids to the final determination of cases arising before it should be as easy of access as possible. It is, perhaps, not too much to say that not a single case arising before the Commission could be properly decided if the complainant, the railroad, or the Commission were bound by the rules of evidence applying to the introduction of testimony in courts." The New York Court of Appeals condemned this informal mode of procedure, under the laws of that state, in Saratoga Springs v. Saratoga Gas, Electric Light and Power Company, 191 N. Y. 123, 18 L. R. A. (N. S.) 713, 724, 725.

wisdom and patriotism" of the Commission a satisfactory substitute in legislative matters for the constitutional discretion of the elected representatives of the people. That "the fixing of rates is essentially legislative in its character" [92] has been declared so often and is so familiar a rule that it is not worth while to multiply authorities. If there were no authorities the nature of the power would be plain from the statements of the consequences of its exercise and of the character of the questions that arise in the course of determining reasonable rates that have been quoted. It is not only a legislative power but it is so strongly legislative that the act of exercising it transforms into a legislature, a body created as a court, sitting as a court and proceeding as a court.

> "The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind. * * * *
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> "Proceedings legislative in nature are not proceedings in a court, within the meaning of Revised Statutes, Section 720, no matter what may be the general or dominant character of the body in which they may take place.
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> "And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in so doing would not have been judicial, although the questions debated by it might have been the same that might have come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterward in a case properly so called. We gather that these are the views of the Supreme Court of Appeals itself.
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> "The question to be decided, we repeat, is legislative, whether a certain rule shall be made. Although the appeal is given as a right, it is not a remedy, properly so called. At that time no case exists.
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> "If the rate should be affirmed by the Supreme Court of Appeals and the railroad still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the Circuit Court, without fear of being met by a plea of *res judicata*." [93]

If such considerations as those herein submitted should lead the Supreme Court of the United States to hold that Section 15 of the interstate commerce law includes an unconstitutional effort to delegate legislative power it

(92) McChord v. Louisville and Nashville Railroad, (1902) 183 U. S. 483, 495.

(93) Mr. Justice Holmes, for the majority of the Supreme Court, Prentis v. Atlantic Coast Line, decided on November 30, 1908, 211 U. S. 210, 53 L. ed. 150.

would not follow that the whole power of the Commission over railway charges and practices would fail. Power was very effectively exercised by the Commission when it acted in aid of the Federal courts, preparing findings of fact and making a general order which, though usually voluntarily obeyed, could be enforced in a suit brought by the Commission or by any party in interest. Though the Commission no longer makes findings of fact which have the weight of *prima facie* evidence the Circuit Courts of the United States still have power to enforce its orders on proper application and after investigation. And the enforcement of such orders, even though they are intended to control future rates is a proper judicial function.[94] Provision for such procedure, strengthened as it now is by authority to make orders much more definite in terms than were permitted formerly, is probably as far as Congress can effectively legislate for the control of rates unless it chooses itself to prescribe, as far as the Constitution permits, the maximum rates to be observed. Though it has sometimes been asserted that it would be "impracticable" for Congress directly to exercise whatever power, in this respect, it may possess, it is a fact that the English Parliament has enacted maximum rates for England and we know that the diligence and ingenuity of that great legislative body does not excel those of the American Congress.[95]

Just a few words will be added concerning the authority granted in Section 20, to prescribe a uniform system of accounts. If the purpose for which these accounts are intended were plainly declared in the statute and could be assumed so thoroughly to control the discretion to be exercised in formulating the system, as to make the function ministerial, this grant of power could not be questioned. But the Commission has assumed to exercise it

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(94) Cincinnati, New Orleans and Texas Pacific Railway v. Interstate Commerce Commission, (1896) 162 U. S. 184, 189; Illinois Central Railroad v. Interstate Commerce Commission, (1907) 206 U. S. 441; Missouri Pacific Railway v. United States, (1903) 189 U. S. 274; Interstate Commerce Commission v. Lake Shore and Michigan Southern Railway, (1905) 197 U. S. 536, 543.

(95) A very experienced and practical legislator, Honorable Stephen B. Elkins, Senator of the United States from West Virginia, thinks that Congress is not without the capacity to enact a schedule of maximum railway rates. See Minority Report of the Committee on Interstate Commerce of the United States Senate on H. R. 12987 (the Hepburn bill) Senate Document 1242, Part 2, Fifty-ninth Congress, First Session, pp. 5, 6.

in a manner which, if it must be considered as intended by the terms of the statute, is absolutely destructive to any such theory. The right to require the setting up of new accounts, not desired by the carriers, which do not represent actual transactions but merely record estimates based upon necessarily inadequate data, has been asserted by the Commission and orders requiring such accounts have been formally issued.[96] It has been considered that there are "possibilities of supervisory control" of railway properties and practices lying within the "administration of a prescribed system of accounting" and that to utilize them the Commission must promulgate "accounting orders" involving the determination of "broad and comprehensive questions of public policy."

> "The financial accounts for all agencies of transportation have been brought to a point at which general questions of public policy, as well as technical questions of accounting, claim consideration. It is regarded as a significant fact, and one which suggests the possibility of supervisory control which lie in the administration of a prescribed system of accounting for public-service industries, that the further accounting orders of the Commission involve broad and comprehensive questions of public policy." [97]

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(96) "The most important principle embodied in the new system of acounting is found in the fact that carriers are required to set up formal depreciation accounts in operating expenses for all classes of equipment."—Statistician to the Interstate Commerce Commission, Nineteenth Annual (1906) Report on the Statistics of the Railways, p. 11. Of course the entries in such accounts must be mere guesses. A "committee of the American Railway Association * * * * strongly urged upon the Interstate Commerce Commission the abandonment of the rules and accounts involving the formal recognition of depreciation charge in operating expenses."—Statement of Professor Henry C. Adams, Statistician to the Commission, Proceedings of the Twentieth Annual (1908) Convention of the National Association of Railway Commissioners, pp. 141, 142.

(97) Twenty-second Annual (1908) Report of the Interstate Commerce Commission, p. 82. The following from the Twenty-first Annual (1908) Report on Statistics of Railways is also significant: "The chief difficulty in drafting a satisfactory balance-sheet statement arises from the different, and to some extent conflicting interests concerned, which, for the sake of explicit statement, may be defined as:—(*a*) The interest of the management; (*b*) the interest of the investor, and (*c*) the interest of the public. * * * * The Form of General Balance Sheet Statement submitted to the Commission and promulgated under an order of June 21, 1909, was constructed, primarily, under the influence of the third interest above described." Surely, in a country in which all have equal rights, no authority less than the legislature can prefer one "interest" over another.

It may be that the significance of the fact lies in its strong suggestion that either the Commission has too liberally construed its powers under Section 20, or Congress has undertaken to delegate a power which only the law-making body can constitutionally exercise.